



## Idaho Department of Environmental Quality Draft §401 Water Quality Certification

January 13, 2017

*2017 U.S. Army Corps of Engineers §404 Nationwide Permits (NWP)*

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Pursuant to the provisions of Section 401(a)(1) of the Federal Water Pollution Control Act (Clean Water Act), as amended; 33 U.S.C. Section 1341(a)(1); and Idaho Code §§ 39-101 et seq. and 39-3601 et seq., the Idaho Department of Environmental Quality (DEQ) has authority to review activities receiving Section 404 dredge and fill permits and issue water quality certification decisions.

Based upon its review of the proposed 2017 Nationwide Permits published in the Federal Register on June 1, 2016, DEQ certifies that if the permittee complies with the terms and conditions imposed by the permits, including the Regional Conditions set forth by the Army Corps of Engineers (ACOE or Corps), along with the conditions set forth in this water quality certification, then there is reasonable assurance the activities will comply with the applicable requirements of Sections 301, 302, 303, 306, and 307 of the Clean Water Act, the Idaho Water Quality Standards (WQS) (IDAPA 58.01.02), and other appropriate water quality requirements of state law.

This certification does not constitute authorization of the permitted activities by any other state or federal agency or private person or entity. This certification does not excuse the permit holder from the obligation to obtain any other necessary approvals, authorizations, or permits, including without limitation, the approval from the owner of a private water conveyance system, if one is required, to use the system in connection with the permitted activities.

### **Antidegradation Review**

The WQS contain an antidegradation policy providing three levels of protection to water bodies in Idaho (IDAPA 58.01.02.051).

- **Tier I Protection.** The first level of protection applies to all water bodies subject to Clean Water Act jurisdiction and ensures that existing uses of a water body and the level of water quality necessary to protect those existing uses will be maintained and protected (IDAPA 58.01.02.051.01; 58.01.02.052.01). Additionally, a Tier I review is performed for all new or reissued permits or licenses (IDAPA 58.01.02.052.07).
- **Tier II Protection.** The second level of protection applies to those water bodies considered high quality and ensures that no lowering of water quality will be allowed unless deemed necessary to accommodate important economic or social development (IDAPA 58.01.02.051.02; 58.01.02.052.08).

- **Tier III Protection.** The third level of protection applies to water bodies that have been designated outstanding resource waters and requires that activities not cause a lowering of water quality (IDAPA 58.01.02.051.03; 58.01.02.052.09).

DEQ is employing a water body by water body approach to implementing Idaho's antidegradation policy. This approach means that any water body fully supporting its beneficial uses will be considered high quality (IDAPA 58.01.02.052.05.a). Any water body not fully supporting its beneficial uses will be provided Tier I protection for that use, unless specific circumstances warranting Tier II protection are met (IDAPA 58.01.02.052.05.c). The most recent federally approved Integrated Report and supporting data are used to determine support status and the tier of protection (IDAPA 58.01.02.052.05).

### ***Pollutants of Concern***

The primary pollutant of concern, for projects permitted under the 2017 NWP's administered by the ACOE is sediment. Where heavy metals are of concern due to mining activities additional considerations may be necessary for projects taking place in such areas. If the project reduces riparian vegetation, then temperature (thermal loading) may also be of concern.

The procedures outlined in the [\*Sediment Evaluation Framework for the Pacific Northwest\*](#)<sup>1</sup> may be applied to assess and characterize sediment to determine the suitability of dredged material for unconfined aquatic placement; to determine the suitability of post dredge surfaces; and to predict effects on water quality during dredging. (See Conditions Necessary, *Fill Material* section for more details).

As part of the Section 401 water quality certification, DEQ is requiring the applicant to comply with various conditions to protect water quality and to meet Idaho WQS, including the criteria applicable to sediment.

### ***Receiving Water Body Level of Protection***

The ACOE NWP's authorize construction activities in waters of the United States. In Idaho, jurisdictional waters of the state can potentially receive discharges either directly or indirectly from activities authorized under the NWP's. DEQ applies a water body by water body approach to determine the level of antidegradation protection a water body will receive.

All waters in Idaho that receive discharges from activities authorized under a NWP will receive, at minimum, Tier I antidegradation protection because Idaho's Tier I antidegradation policy applies to all state waters. Water bodies that fully support their aquatic life or recreational uses are considered *high quality waters* and will receive Tier II antidegradation protection. Because of the statewide applicability, the antidegradation review will assess whether the NWP permit complies with Tier I and Tier II antidegradation provisions.

Although Idaho does not currently have any Tier III designated outstanding resource waters (ORWs), it is possible for a water body to be designated as an ORW during the life of the NWP's. Because of this potential, the antidegradation review also assesses whether the permit complies with the outstanding resource water requirements of Idaho's antidegradation policy.

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<sup>1</sup> Northwest Regional Sediment Evaluation Team (RSET). 2016. Sediment Evaluation Framework for the Pacific Northwest. Prepared by the RSET Agencies, July 2016, 160 pp plus appendices.

To determine the support status of the receiving water body, the most recent EPA-approved Integrated Report, available on Idaho DEQ’s website, is to be used:

<http://www.deq.idaho.gov/water-quality/surface-water/monitoring-assessment/integrated-report/>.

High quality waters are identified in Categories 1 and 2 of the Integrated Report. If a water body is in either Category 1 or 2, it is a Tier II water body.

Unassessed waters are identified in Category 3 of DEQ’s Integrated Report. These waters require a case-by-case determination to be made by DEQ based on available information at the time of the application for permit coverage.

Impaired waters are identified in Categories 4 and 5 of the Integrated Report. Category 4(a) contains impaired waters for which a [TMDL](#) has been approved by EPA. Category 4(b) contains impaired waters for which controls other than a TMDL have been approved by EPA. Category 5 contains waters which have been identified as “impaired”, for which a TMDL is needed. These waters are Tier I waters, for the use which is impaired. With the exception, if the aquatic life uses are impaired for any of these three pollutants—dissolved oxygen, pH, or temperature—and the biological or aquatic habitat parameters show a healthy, balanced biological community, then the water body shall receive Tier II protection, in addition to Tier I protection, for aquatic life uses (IDAPA 58.01.02.052.05.c.i).

DEQ’s webpage also has a link to the state’s map-based Integrated Report which presents information from the Integrated Report in a searchable, map-based format:

<http://www.deq.idaho.gov/assistance-resources/maps-data/>.

Water bodies can be in multiple categories for different causes. If assistance is needed in using these tools, or if additional information/clarification regarding the support status of the receiving water body is desired, please feel free to contact your nearest DEQ regional office or the State Office (Table 1).

**Table 1.** Idaho DEQ Regional and State Office Contacts

<i>Regional Office</i>	<i>Address</i>	<i>Phone Number</i>	<i>Email</i>
Boise	1445 N. Orchard Rd., Boise 83706	208-373-0550	<a href="mailto:julia.achabal@deq.idaho.gov">julia.achabal@deq.idaho.gov</a>
Coeur d’Alene	2110 Ironwood Parkway, Coeur d’Alene 83814	208-769-1422	<a href="mailto:june.bergquist@deq.idaho.gov">june.bergquist@deq.idaho.gov</a>
Idaho Falls	900 N. Skyline, Suite B., Idaho Falls 83402	208-528-2650	<a href="mailto:troy.saffle@deq.idaho.gov">troy.saffle@deq.idaho.gov</a>
Lewiston	1118 “F” St., Lewiston 83501	208-799-4370	<a href="mailto:mark.sellet@deq.idaho.gov">mark.sellet@deq.idaho.gov</a>
Pocatello	444 Hospital Way, #300 Pocatello 83201	208-236-6160	<a href="mailto:greg.mladenka@deq.idaho.gov">greg.mladenka@deq.idaho.gov</a>
Twin Falls	650 Addison Ave.	208-736-2190	<a href="mailto:balthasar.buhidar@deq.idaho.gov">balthasar.buhidar@deq.idaho.gov</a>

	W., Suite 110, Twin Falls 83301		
State Office	1410 N. Hilton Rd., Boise 83706	208-373-0502	<a href="mailto:nicole.deinarowicz@deq.idaho.gov">nicole.deinarowicz@deq.idaho.gov</a>

### ***Protection and Maintenance of Existing Uses (Tier I Protection)***

A Tier I review is performed for all new or reissued permits or licenses, applies to all waters subject to the jurisdiction of the Clean Water Act, and requires demonstration that existing uses and the level of water quality necessary to protect existing uses shall be maintained and protected. The numeric and narrative criteria in the WQS are set at levels that ensure protection of existing and designated beneficial uses.

Water bodies not supporting existing or designated beneficial uses must be identified as water quality limited, and a total maximum daily load (TMDL) must be prepared for those pollutants causing impairment. Once a TMDL is completed, discharges of causative pollutants shall be consistent with the allocations in the TMDL (IDAPA 58.01.02.055.05). Prior to the completion of a TMDL, the WQS require the application of the antidegradation policy and implementation provisions to maintain and protect beneficial uses (IDAPA 58.01.02.055.04).

The general (non-numeric) effluent limitations in the NWP and associated Regional Conditions for the ACOE Walla Walla District address best management practices (BMPs) aimed at minimizing impacts to the aquatic environment, especially sediment and turbidity impacts including: vegetation protection and restoration, de-watering requirements, erosion and sediment controls, soil stabilization requirements, pollution prevention measures, prohibited discharges, and wildlife considerations. Although the NWPs do not contain specific (numeric) effluent limitations for sediment or turbidity, the BMPs identified in the permits and in this water quality certification will ensure compliance with DEQ's water quality standards, including the narrative sediment criteria (IDAPA 58.01.02.200.08) and DEQ's turbidity criteria (IDAPA 58.01.02.250.02.e).

In order to ensure compliance with Idaho WQS, DEQ has included a condition requiring the permittee(s) to comply with Idaho's numeric turbidity criteria, developed to protect aquatic life uses. The criterion states, "Turbidity shall not exceed background turbidity by more than 50 nephelometric turbidity units (NTU)<sup>2</sup> instantaneously or more than 25 NTU for more than 10 consecutive days" (IDAPA 58.01.02.250.02.e). DEQ is requiring turbidity monitoring when project activities result in a discharge to waters of the United States that causes a visible sediment plume. (See Conditions Necessary, *Turbidity* section for more details).

If there is an approved TMDL on a receiving water body that requires a load reduction for a pollutant of concern then the project must be consistent with that TMDL.

For authorized activities requiring a pre-construction notification (PCN), the Corps will have the opportunity to evaluate the NWP activities on a case-by-case basis to ensure that the activity will

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<sup>2</sup>NTU is a unit of measure of the concentration of suspended particles in the water (turbidity). It is determined by shining a light through a sample and measuring the incident light scattered at right angles from the sample.

not cause more than a minimal adverse environmental effect, individually and cumulatively. The Corps has agreed to forward the verification letters to the appropriate DEQ regional office (Table 1) for all authorized activities including the NWP activities that require a PCN. This will better inform DEQ of the authorized activities that are occurring throughout the state and determine if additional conditions will need to be implemented when the ACOE reissues the NWPs in 5 years.

DEQ concludes that, given the nature of the activities authorized by the 2017 NWPs, such activities will comply with Idaho's Tier I requirements under IDAPA 58.01.02.051.01 and 58.01.02.052.07, provided the permitted activities are carried out in compliance with the limitations and associated requirements of the 2017 NWPs, Regional Conditions and conditions set forth in this water quality certification.

### ***Protection of High-Quality Waters (Tier II Protection)***

Water bodies that fully support their beneficial uses are recognized as high-quality waters and will be provided Tier II protection in addition to Tier I protection. Water quality parameters applicable to existing or designated beneficial uses must be maintained and protected under Tier II, unless a lowering of water quality is deemed necessary to accommodate important economic or social development.

The ACOE does not authorize projects with more than "minimal individual and cumulative impacts" on the aquatic environment under a NWP. As required by the National Environmental Policy Act (NEPA) the Corps has analyzed the individual and cumulative effects for the NWP activities. DEQ recognizes that short term changes in water quality may occur with respect to sediment as a result of the authorized activities, but does not expect any long term adverse changes to water quality. As a general principle, DEQ believes degradation of water quality should be viewed in terms of permanent or long-term adverse changes. Short-term or temporary reductions in water quality, if reasonable measures are taken to minimize them, may occur without triggering a Tier II analysis.

To ensure proposed regulated activities will not cause more than minimal individual and cumulative impacts on the aquatic environment, certain NWPs require project proponents to notify district engineers (in the form of a PCN) of their proposed activities prior to conducting regulated activities. This level of review gives the district engineer the opportunity to evaluate activities on a case-by-case basis to determine whether additional conditions or mitigation requirements are warranted to ensure that the proposed activity results in no more than the minimal individual and cumulative impacts on the aquatic environment.

DEQ has denied certification for NWP 12, NWP 13, and NWP 14 when a PCN is required. DEQ will be issuing an individual certification to ensure no lowering of water quality occurs for any of these projects proposed on Tier II water.

Additionally, if an authorized project causes a visible sediment plume on a Tier II water then turbidity monitoring is required.

DEQ concludes that the activities authorized by the 2017 NWPs will comply with Idaho's Tier II requirements under IDAPA 58.01.02.051.02 and 58.01.02.052.08 providing permitted activities

are carried out in compliance with the limitations and associated requirements of the 2017 NWP, Regional Conditions and conditions of this water quality certification.

### ***Protection of Outstanding Resource Waters (Tier III Protection)***

Idaho's antidegradation policy requires that the quality of outstanding resource waters (ORWs) be maintained and protected from the impacts of point and nonpoint source activities (IDAPA 58.01.02.051.03). No water bodies in Idaho have been designated as ORWs to date. Because it is possible waters may become designated during the term of the 2017 NWP, DEQ has evaluated whether the NWP comply with the ORW antidegradation provision.

The ACOE does not authorize projects with more than "minimal individual and cumulative impacts" on the aquatic environment under a NWP. DEQ recognizes that short term changes in water quality may occur with respect to sediment as a result of the authorized activities, but does not expect any long term adverse changes to water quality. DEQ believes that the terms of the 2017 NWP, Regional Conditions and conditions of this water quality certification provides reasonable assurance there will be no lowering of water quality.

As a condition of this certification, DEQ is requiring that the permittee coordinate with the appropriate DEQ regional office prior to filing their Joint Application for Permit with the Corps to ensure there is no lowering of water quality on any future designated ORWs.

In sum, DEQ concludes that the authorized activities will comply with Idaho antidegradation provisions should waters become designated ORWs during the term of the NWP.

## **Conditions Necessary to Ensure Compliance with Water Quality Standards or Other Appropriate Water Quality Requirements of State Law**

### ***Best Management Practices***

Best Management Practices (BMPs) must be designed, implemented, and maintained by the permittee to fully protect and maintain the beneficial uses of waters of the state and to prevent exceedances of state water quality standards. BMPs shall be selected and installed prior to construction. The permittee must monitor and evaluate BMP effectiveness each day during project activities to assure that water quality standards are being met.

Approved BMPs for specific activities (mining, forestry, stream channel alteration, etc.) are codified in IDAPA 58.01.02.350. Additionally, DEQ has a catalog of Stormwater best management practices that is available at: <http://www.deq.idaho.gov/media/494058-entire.pdf>. This catalog presents a variety of BMPs that can be used to control erosion and sediment during and after construction. Other sources of information are also available and may be used for selecting project appropriate BMPs.

### ***Notification***

The ACOE has agreed to forward the verification letters to the appropriate DEQ regional office (Table 1) for all authorized activities for which a verification letter is issued. This will better



inform DEQ of the authorized projects that are occurring throughout the state and allow DEQ to determine if additional conditions will need to be implemented when the ACOE reissues the NWP in 5 years.

### *Waiver Consultation*

Prior to the District Engineer making a waiver determination, the ACOE will coordinate with the appropriate DEQ regional office to ensure the proposed activity is in compliance with Idaho's water quality standards.

### *TMDL Compliance*

If there is an approved or established TMDL, then the permittee must comply with the established loads in the TMDL.

### *Outstanding Resource Waters*

Should waters become designated as ORWs during the term of the NWPs, a permittee proposing a project on an ORW must contact the appropriate DEQ regional office regarding the location and specifics of the project prior to filing their Joint Application for Permit with the Corps to ensure there will be no lowering of water quality on an ORW.

### *Fill Material*

Fill material subject to suspension shall be free of easily suspended fine material. The fill material to be placed in waters of the United States shall be clean material only. If dredged material is proposed to be used as fill material and there is a possibility the material may be contaminated, then the permittee should apply the procedures in the *Sediment Evaluation Framework for the Pacific Northwest* (RSET, 2016) to assess and characterize sediment to determine the suitability of dredged material for unconfined-aquatic placement; determine the suitability of post dredge surfaces; and to predict effects on water quality during dredging. This document is available at

<http://cdm16021.contentdm.oclc.org/cdm/ref/collection/p16021coll11/id/973>

### *Turbidity*

All projects must be carried out in a manner that does not violate Idaho's numeric criterion for turbidity, which states: "Turbidity shall not exceed background turbidity by more than 50 NTU instantaneously or more than 25 NTU for more than 10 consecutive days" (IDAPA 58.01.02.250.02.e). Monitoring is required when there are discharges into waters of the United States that cause a visible sediment plume.

A properly and regularly calibrated turbidimeter is required for measurements analyzed in the field (preferred method), but grab samples may be collected and taken to a laboratory for analysis. When monitoring is required a sample must be taken at an undisturbed area immediately up-current from in-water disturbance or discharge to establish background turbidity levels. Background turbidity, latitude/longitude, date, and time must be recorded prior to monitoring down-current. Then a sample must be collected immediately down-current from the in-water disturbance or point of discharge and *within* any visible sediment plume. The turbidity, latitude/longitude, date, and time must be recorded for each sample. The downstream sample

must be taken immediately following the upstream sample in order to obtain meaningful and representative results.

Results from the down-current sampling point must be compared to the up-current or background level sampled during each monitoring event. If the down-current turbidity exceeds up-current or background turbidity by 50 nephelometric turbidity units (NTU) or more, then the project is causing an exceedance of the WQS. If an exceedance occurs, the applicant must inspect the condition of the projects BMPs. If the BMPs appear to be functioning to their fullest capability, then the applicant must modify the activity (this may include modifying the existing BMPs). Any exceedance of the turbidity standard must be reported to the appropriate DEQ regional office (Table 1) within 24 hours.

Copies of turbidity monitoring records or logs must be available to DEQ upon request. The log must include background measurements (in NTUs); down-current measurements, comparison of background and down-current monitoring as a numeric value (in NTUs), and latitude/longitude, time and date for each sampling event. Monitoring records or logs must describe all exceedances and subsequent actions taken to correct the violations, including monitoring and the effectiveness of the action(s) taken.

### *Mixing Zones*

If a mixing zone, or alternatively a point of compliance is desired then the permittee must contact the appropriate DEQ regional office to obtain authorization.

### *Culverts*

To prevent road surface and culvert bedding material from entering a stream, culvert crossings must include best management practices to retain road base and culvert bedding material. For perennial waters one should consider the Idaho Stream Channel Alterations rules (IDAPA 37.03.07 found at <https://adminrules.idaho.gov/rules/2012/37/0307.pdf>). Another source of BMPs for culvert installation can be found in the Idaho Forest Practices Act (IDAPA 20.20.01 found at <https://adminrules.idaho.gov/rules/current/20/0201.pdf>). Examples of best management practices include, but are not limited to: parapets, wing walls, inlet and outlet rock armoring, compaction, suitable bedding material, anti-seep barriers such as bentonite clay or other acceptable roadway retention systems.

### *Wood Preservatives*

DEQ's "[\*Guidance for the Use of Wood Preservatives and Preserved Wood Products In or Around Aquatic Environments\*](#)" must be considered when using treated wood materials in the aquatic environment. Within this guidance document DEQ references the [\*Best Management Practices for the Use of Treated Wood in Aquatic and Wetland Environments\*](#)<sup>3</sup>. This document provides recommended guidelines for the production and installation of treated wood products destined for use in sensitive environments.

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<sup>3</sup> Western Wood Preservers Institute, Wood Preservation Canada, Southern Pressure Treaters' Association, and Southern Forest Products Association. 2011. "Best Management Practices: For the Use of Treated Wood in Aquatic and Wetland Environments" Vancouver, WA: Western Wood Preservers Institute.



### *Reporting of Discharges Containing Hazardous Materials or Deleterious Materials*

All spills of hazardous material, deleterious material or petroleum products which may impact waters (ground and surface) of the state shall be immediately reported. Call 911 if immediate assistance is required to control, contain or clean up the spill. If no assistance is needed in cleaning up the spill, contact the appropriate DEQ regional office in Table 2 during normal working hours or Idaho State Communications Center after normal working hours. If the spilled volume is above federal reportable quantities, contact the National Response Center.

For immediate assistance: Call 911

National Response Center: (800) 424-8802

Idaho State Communications Center: (208) 632-8000

**Table 2.** Idaho DEQ Regional Contacts

<i>Regional Office</i>	<i>Toll Free Phone Number</i>	<i>Phone Number</i>
Boise	888-800-3480	208-373-0550
Coeur d'Alene	877-370-0017	208-769-1422
Idaho Falls	800-232-4635	208-528-2650
Lewiston	877-541-3304	208-799-4370
Pocatello	888-655-6160	208-236-6160
Twin Falls	800-270-1663	208-736-2190

## **Projects for Which Certification Is Denied**

DEQ does not have the required reasonable assurance that the following activities will comply with State WQS and other appropriate requirements of state law. Therefore, DEQ denies certification with respect to activities authorized to occur on waters designated as ORWs during the term of the permit. In addition, DEQ denies certification with respect to the activities listed below, except those that occur on man-made waterways as defined in the WQS (IDAPA 58.01.02.010.58). The applicant will be required to obtain an individual certification before the activity can be conducted.

### *NWPs partially denied*

- NWP 12 – Utility Line Activities; activities requiring a Pre-Construction Notification (PCN) are not certified.
- NWP 13 – Bank Stabilization; activities requiring a Pre-Construction Notification (PCN) are not certified.

- NWP 14 – Linear Transportation Projects; activities requiring a Pre-Construction Notification (PCN) are not certified.

#### *NWPs denied entirely*

- NWP 16 - Return Water from Upland Contained Disposal Areas
- NWP 17 - Hydropower Projects
- NWP 23 - Approved Categorical Exclusions
- NWP 51 – Land-Based Renewable Energy Generation Facilities
- NWP 52 – Water-Based Renewable Energy Generation Pilot Projects
- NWP 53 – Removal of Low-Head Dams
- NWP 54 – Living Shorelines

## **Other Conditions**

This certification is conditioned upon the requirement that if there are material modification of the NWPs or the permitted activities—including without limitation, significant changes from the draft to final NWPs, significant changes to the draft Regional Conditions, or the Waters of the United States (WOTUS) rule becoming effective—then DEQ may re-evaluate the certification to determine compliance with Idaho WQS and to provide additional certification pursuant to Section 401.

## **Right to Appeal Final Certification**

The final Section 401 Water Quality Certification may be appealed by submitting a petition to initiate a contested case, pursuant to Idaho Code § 39-107(5) and the “Rules of Administrative Procedure before the Board of Environmental Quality” (IDAPA 58.01.23), within 35 days of the date of the final certification.

Questions or comments regarding the actions taken in this certification should be directed to Nicole Deinarowicz, State Office IDEQ, at (208) 373-0591 or via email at [nicole.deinarowicz@deq.idaho.gov](mailto:nicole.deinarowicz@deq.idaho.gov).

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Barry N. Burnell

Water Quality Division Administrator